

BETTERMENT AGREEMENT

This Agreement is entered into by and between The Town of Foxborough, by its Board of Health and Treasurer, and _____ this day of _____.

WHEREAS, the Owner owns residential property, including improvements thereon, known as and numbered _____, Massachusetts, (Assessors' Map _____, Lot _____, Block _____) and described in a deed dated _____ and recorded with the Registry of Deeds in Book _____, Page _____, [filed as Document No. _____ with the Registry District of the Land Court] (_____ and _____).

WHEREAS, the Owner has petitioned the Town of Foxborough to make findings pursuant to M.G.L.c. 111; and

WHEREAS, the Board of Health has made findings, pursuant to M.G.L.c. 111, that the on-site subsurface sewage disposal system serving the Property (the Failed System), exhibits one or more of the failure criteria set forth in Title 5 of the State Environmental Code, 310 CMR 15.000 (Title 5), such findings being made by the Board of Health prior to, or during the course of proceedings conducted pursuant to M.G.L. c. 111, §127B; and

WHEREAS, the Board of Health has adopted an Order requiring the Owner to repair, replace or upgrade the failed system to comply with the requirements of said Title 5; and

WHEREAS, the Owner has, pursuant to M.G.L. c. 111, §127B1/2, applied to the Town of Foxborough for financial assistance to repair, replace and/or upgrade the failed system; and

WHEREAS, the Town of Foxborough intends to provide financial assistance to the owner in the form of a Betterment Agreement made pursuant to said M.G.L. c. 111, §127B 1/2; and

WHEREAS, the parties intend by this Betterment Agreement to cause the repair, replacement and/or upgrade the failed system to comply with Title 5 and other applicable public health and environmental laws and to complete other work directly or indirectly related thereto (the "project" as described in Paragraph 4 hereof); and

WHEREAS, the parties intend to have the project performed by one or more persons under contract to complete the project (the "contractor(s)"); and

WHEREAS, the public purpose of the project is to protect the public health, safety, welfare and the environment by the repair, replacement and/or upgrade of the failed system.

NOW THEREFORE, the parties, for and in consideration of mutual covenants and other good and valuable consideration, do hereby agree to the terms of this Agreement, as set forth below.

1. The Agreement

The Town of Foxborough hereby agrees to provide financial assistance in an amount up to \$_____ to be advanced from time to time by the Town of Foxborough to the owner pursuant to

the terms of this Agreement. The owner promises to repay, with interest as set forth herein, all sums provided to owner by the Town of Foxborough. Following notice to the owner by the Town of Foxborough collector of taxes of the amount of the betterment assessment, an amortization schedule shall be developed and incorporated as an attachment to this Agreement¹.

Interest on the amounts advanced by the Town of Foxborough to owner shall be computed annually at the rate of two percent (2%) per annum on the outstanding principal balance, accruing from the 30th day after the Town of Foxborough Assessor commits the betterment assessment to the Town of Foxborough collector of taxes. The amount to be repaid shall be included on and paid with the (quarterly, semi-annual, annual) municipal tax bill. Interest amounts due prior to the inclusion of amounts due hereunder on the tax bill shall be paid pursuant to an interim bill.

In cases where the final amount of the betterment has been definitively established at the signing of the Betterment Agreement, the amortization schedule should be developed and incorporated into the Betterment Agreement at the outset.

All outstanding amounts due to the Town of Foxborough by owner if not prior paid, shall be due and payable on _____ [fill in date of term].

Prepayment in full or in part of all amounts advanced hereunder may be made by the owner without penalty.

This Agreement represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. The Agreement may only be amended or modified by a written modification.

2. Installment Payments.

The Town of Foxborough shall make advances of funds to owner and contractor, pursuant to the terms of this Agreement, from time to time to pay for the project. Such advances shall be made solely for the purposes set forth in this Agreement.

The obligation of the Town of Foxborough to advance all or any part of the financial assistance for repair, replacement and/or upgrade of the failed system is subject to the following:

(A) Inspection of the failed system by a representative of Board of Health or by a DEP Certified Septic System Inspector, as deemed necessary by the Board of Health;

(B) Submission by owner or contractor on behalf of the owner of plans approved by the Board of Health for the project. In the event owner seeks an installment payment to pay for field work and preparation of plans for the project, owner shall

- (i) solicit a bid or bids for the necessary field work and plan preparation from registered professional engineers or registered sanitarians,
- (ii) shall submit documentation of these bids to the Town of Foxborough and (iii) specify owner's choice of an engineer or sanitarian. The Board of Health may approve an installment payment not to exceed the amount of the selected bid. An installment payment for field work and plan preparation shall be made by check payable jointly to

owner and the engineer or sanitarian and shall be payable upon presentation and approval of the selected bid;

(C) Submission to Board of Health by owner of the bid or bids for the project in accordance with the plans from licensed (including, but not limited to, a Disposal System Installer's Permit), insured, septic system contractors, which bids shall contain detailed breakdowns of the cost of the project by tasks;

(D) Confirmation by Board of Health that the contractor for the construction of the Project (the "Contractor") selected by owner has a valid Disposal System Installer's Permit in effect for the time period covering the system upgrade financed under this Betterment Agreement;

(E) Review by Board of Health of a Project Budget based on the bid submitted by the contractor;

(F) Execution of a construction contract between the owner and the contractor pursuant to the plans and specifications which have been previously approved by the Board of Health;

(G) Issuance by the Board of Health of a Disposal System Construction Permit with respect to the project.

3. Conditions for Payment

Installment payments of the financial assistance are to be made by the Town of Foxborough under the following conditions:

(A) An installment payment for field work and preparation of plans shall be made to the owner and engineer or sanitarian in accordance with Subsection (B) of Section 2.

(B) A reasonable time before the date on which any other installment payment is requested to be made, the contractor shall give notice to owner and Town of Foxborough specifying the total installment payment requested. Such notice shall consist of a detailed request describing the value of the completed items of work. The amount of the request shall equal the amount of the requested installment. The request shall be accompanied by a sworn certificate of the contractor that all suppliers, subcontractors and employees have been paid for prior work on the project. The Town of Foxborough may request the owner to provide further documentation in support of a request for an installment payment. Upon approval of any requested installment payment, the Town of Foxborough shall issue a check payable jointly to owner and contractor, which check shall be forwarded by Town of Foxborough to owner.

(C) Town of Foxborough may require as a condition of any installment payment that owner submit satisfactory evidence that there are sufficient remaining funds to pay for completion of the project in accordance with the approved plans.

(D) Prior to making an installment payment, the Board of Health may cause the project to be inspected to verify that the work items described in the request have been actually completed. In any case, the contractor shall provide verification that the work referred to in the installment request has been completed in accordance with the approved plans.

(E) Prior to paying the final installment, the contractor shall provide verification that all work has been completed in accordance with the approved plans, a sworn certificate that all suppliers, subcontractors and

employees have been paid for work on or materials supplied for the project and the Board of Health shall have issued a Certificate of Compliance for the project.

4. Scope of Work for Project

The owner and the contractor, pursuant the Disposal System Construction Permit issued by the Board of Health, shall determine the Scope of the Work necessary to bring the failed system into compliance with Title 5. Such Scope of Work may include, but not be limited to:

- (a) performing soil and percolation tests and other necessary site analyses;
- (b) specification of the failed system components to be repaired, replaced and/or upgraded;
- (c) design of the system or components thereof to be repaired, replaced and/or upgraded;
- (d) obtaining all applicable federal, state and local permits and approvals required to complete the work;
- (e) seeking bids and awarding contracts for assessment, design, consulting and construction work and materials in accordance with applicable laws, regulations and requirements;
- (f) minimizing any disruption of utility service, and reasonably restoring the property to as near its original condition as practicable; and
- (g) engaging such other services and procuring such other materials as shall be reasonably necessary to complete the project in a good and workmanlike manner.

All such work shall be performed pursuant to written contracts and agreements, copies of which shall be incorporated by reference into this Agreement.

5. Town of Foxborough Right to Inspect

The owner agrees to allow the Town of Foxborough, including its Board of Health, Health Agent and other officials, employees and agents to enter onto the property, as is reasonably necessary and upon reasonable notice, to test, examine and inspect the project to verify the completion and adequacy of the work.

6. Covenant Not To Sue

The owner covenants and agrees not to sue the Town of Foxborough for any claims of damage to or loss of property of the owner or others, or for breach of warranty regarding the performance or condition of the project, or for injury, illness or death arising out of the performance of any contractors or agents engaged to perform the Work. This Covenant Not To Sue provision shall have no application to causes of action which may have arisen prior to the execution of this Agreement, or to causes of action that are unrelated to this Agreement, or to causes of action against any person or entity other than the Town of Foxborough.

7. Owner's Representations And Warranties To The Town of Foxborough

The owner represents and warrants to the Town of Foxborough that:

(A) Financial Information: The borrower's Affidavit furnished to Town of Foxborough by the owner is accurate and complete;

(B) Title: The owner has good record title to the property, subject only to the

Encumbrances of Record;

(C) Permits and Compliance With Law: The owner has obtained or will obtain all necessary governmental permits for the project. The On-Site Sewage Disposal System for the dwelling on the property, after completion of the project, will comply with all applicable laws, regulations, codes and ordinances, including but not limited to Title 5; and

(D) Insurance: The owner and contractor have procured or will procure insurance in such forms and in such amounts as shall be satisfactory to the Town of Foxborough. Certificates of Insurance shall be attached as Exhibits to this Agreement.

Each of the foregoing representations and warranties in this section shall remain in force until the financial assistance is repaid in full. The owner shall indemnify and hold harmless the Town of Foxborough from and against loss, expense, or liability (including costs of defending any claim), directly or indirectly from the falsity, inaccuracy, or breach of any of the above representations and warranties.

8. Owner's Obligations.

During the term of this Betterment Agreement, the owner agrees that the owner shall comply with all of the terms and conditions of this and any related agreement and that the owner shall:

(A) Completion of Project. Cause the project to be promptly completed in a manner in accordance with the approved plans and with the Project Budget and in compliance with all applicable laws, regulations, codes and ordinances and notify Town of Foxborough when the project is complete.

(B) Records and Cooperation With the Town of Foxborough. Keep complete records relating to the project, which records shall be available for inspection and copying by the Town of Foxborough, and cooperate fully with any audit of the project if so requested by the Town of Foxborough.

(C) Performance of Other Obligations. Perform all the owner's obligations and agreements under any present or future mortgage or other Covenant or Agreement which encumbers the property.

(D) Use of Financial Assistance. The financial assistance is provided for the public purpose of protecting the public health, safety, welfare and the environment. The owner shall use the proceeds of the financial assistance solely for costs included in the project budget and ensure that the proceeds are not used for any other purpose.

9. Events Of Default

The owner shall be in default under this Agreement upon the occurrence of any one or more of the following events:

(A) Sale, Transfer or Assignment Without Approval. The owner assigns or transfers any money advanced or to be advanced hereunder to any person or entity not approved by the Town of Foxborough.

(B) Cessation of Construction. The owner or contractor ceases construction of the project for more than 30 consecutive calendar days. The Board of Health may waive this event of default upon application of the owner and a demonstration that such cessation occurred because of an Act of God, governmental order or restriction, fire or other casualty, or other causes beyond owner's reasonable control.

(C) False Representations or Warranties. Any representation or warranty made herein shall prove to be false or inaccurate in any material respect.

(D) Breach of an Obligation. The owner defaults in the performance of any of owner's obligations contained herein.

10. Town of Foxborough Rights On Default

Upon owner's default, the Town of Foxborough shall have no further obligation to make any further installment payments and all amounts advanced by Town of Foxborough to owner shall become immediately due and payable.

11. Notice of Betterment Agreement

Upon execution of this Agreement by the owner and the Town of Foxborough a Notice of this Agreement shall be recorded as a betterment and shall be subject to the provisions of M.G.L.c. 80 relative to apportionment, division, reassessment and collection of assessment, abatement and collection of assets, provided however, that the lien which shall arise pursuant to M.G.L. c. 111, §127B 1/2 shall take effect by operation of law on the day immediately following the due date of such assessment or apportioned part of such assessment. The Betterment Lien, if any, shall be deemed to secure all amounts advanced hereunder, together with interest thereon, and shall include costs of collection and reasonable attorneys fees.

12. Improvements to the Property

Any alterations or improvements to the property resulting from the project are the property of the owner, and the Town of Foxborough shall bear no responsibility for the condition of the improvement or its maintenance.

13. Cancellation of the Agreement by the Owner

The owner may by written notice to the Board of Health and the Treasurer of the Town of Foxborough cancel owner's further obligations for repayment under this Agreement at any time prior to the end of ten

(10) calendar days following notice in writing to the Town of Foxborough of the owner's proposed successful construction bid, based on the owner's evaluation of the proposed scope and cost estimate of the system upgrade derived from the field work, project design and the successful construction bid. However, in the event of such cancellation, the owner shall remain liable for repayment of all sums advanced by the Town of Foxborough to owner pursuant to this Agreement. All sums advanced by the Town of Foxborough to owner shall be repaid with interest and within the term set forth in Paragraph 1 hereof. Upon application of the owner, the Board of Health may revoke the Order for Improvements, provided however, that owner shall remain liable to comply with the provisions of Title 5.

14. Personal Obligation of the Owner

In addition to those remedies available to the Town of Foxborough regarding the assessment and collection of betterments, the owner shall be personally liable for the repayment of the amounts advanced, plus interest thereon and the total direct and indirect costs incurred by the City Town of Foxborough in the contemplation and the performance of this Agreement or the project. After written request of owner, in connection with the purchase or transfer of the owner's entire interest in the property, the Town of Foxborough shall permit the assumption of the personal liability hereunder by said purchaser or transferee and shall release the personal liability of the owner. The assumption and release of liability hereunder shall be in writing and shall be executed prior to the purchase or transfer by the owner, the purchaser or transferee and the Treasurer of said Town of Foxborough.

15. Notice

Any notice required to be given under this Agreement shall be made in writing and shall be delivered by either in-hand delivery or by prepaid, first class mail.

If notice is made to the Town of Foxborough, it shall be made to:

Notice shall be deemed given on the day it is hand delivered or three (3) days after the date of posting of first class mail.

16. Funding for the Agreement

The obligations of the Town of Foxborough are expressly contingent upon funding. In the event that funding for the City/Town's obligation is unavailable, upon notice to the owner, the City/Town may cancel this Agreement and all obligations of the Town of Foxborough shall be null and void.

17. Enforcement of Laws

Nothing in this Agreement shall be deemed to stop or effect a waiver, or otherwise act as a bar or defense, to any legal proceeding by the Town of Foxborough relating to the system or the property.

18. Severability

In the event that one or more provisions of this Agreement is deemed unenforceable by a court of competent jurisdiction, the Agreement, except as deemed unenforceable, shall remain in full force and effect.

19. Governing Law

This Agreement shall be governed by Massachusetts law.

IN WITNESS WHEREOF, the undersigned parties have signed this Agreement as an instrument under seal this day of _____, 2010 .

Signature

Commonwealth of Massachusetts
County of Norfolk

On this _____ day of _____, 20____, before me, the undersigned notary public, personally appeared _____ (name of document signer), who is personally known to me or proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that she/he/they signed it voluntarily for its stated purpose.

Notary Public

My commission expires _____

Town of Foxborough: Owner: _____

Address: _____

By it's Board of Health:

As to interest rate: Approved as to form:

Town of Foxborough

By it's Treasurer:

City Solicitor/Town Counsel

Exhibits

1. Designer Contract
2. System Plans and Design
3. Construction Contract(s)
4. Project Budget
5. Certificate(s) of Insurance
6. Disposal System Construction Permit

